Filed 8/10/04 P. v. Alcaraz CA4/2

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

| | |
|---|---|
| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>ALEJANDRO MARTINEZ ALCARAZ et al.,<br>Defendants and Appellants. | E033488<br>(Super.Ct.No. RIF099759)<br>OPINION |

APPEAL from the Superior Court of Riverside County. Edward D. Webster, Judge. Affirmed with directions.

Halpern & Halpern Law Offices and H. Russell Halpern for Defendant and Appellant Alejandro Martinez Alcaraz.

Sharon M. Jones, under appointment by the Court of Appeal, for Defendant and Appellant Porfirio Lopez.

A. M. Weisman, under appointment by the Court of Appeal, for Defendant and Appellant Edgar Zarate Martinez.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Robert M. Foster and Raquel M. Gonzalez, Supervising Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Alcaraz, Lopez and Martinez of first degree murder (Pen. Code, § 187, subd. (a)),[1] four counts of attempted murder (§§ 664/187, subd. (a)), mayhem (§ 203), and assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(1)). As to all these offenses, the jury found true allegations that they were committed for the benefit of a street gang. (§ 186.22, subd. (b).) As to each of the foregoing crimes, except for the aggravated assault, the jury found that each defendant was a principal and a principal discharged a firearm proximately causing great bodily injury or death. (§ 12022.53, subds. (d) & (e).) As to Alcaraz, alone, the jury further found as to each offense, but the aggravated assault, that he had personally discharged a firearm proximately causing serious bodily injury or death. (§ 12022.53, subd. (d).) As to Alcaraz, the jury further found the special circumstance that the murder was committed while he was active in a gang. (§ 190.2, subd. (a)(22).) Finally, the jury also convicted Alcaraz of possessing a firearm as an ex-felon. (§ 12021, subd. (a)(1).) Alcaraz was sentenced to prison for life without the possibility of parole, plus four life terms, plus five 25-year-to-life terms, plus 10 years 8 months. Lopez was sentenced to prison for two terms of 25 years to life. Martinez was sentenced to prison for life, plus three terms of 25

[1] All further statutory references are to the Penal Code.

years to life. They make various contentions, which we reject. Therefore, we affirm their convictions while directing the trial court to correct numerous errors in their abstracts of judgment.

## FACTS

On September 22, 2001, Lopez and Martinez "crashed" a quinceanera party at a hall in Hemet. Martinez bumped into the murder victim's brother,[2] who was in the company of the attempted murder victims, and an argument resulted between the two after Martinez directed a profanity at the murder victim's brother. Martinez said he was going to "catch [the murder victim's brother] on the rebound" and he told him to watch his back and that he would "cap" him, which meant "[f]ire like a gunshot." The honoree kicked Martinez and his companions, including Lopez, out of the party. Lopez and Martinez went to Alcaraz's home and told him that they had been in an argument and they wanted him to go with them. Alcaraz drove them back to the parking lot of the hall, with Martinez in the back seat and Lopez in the front passenger seat. Martinez got out and began fighting with the murder victim's brother, who was in the lot with the attempted murder victims. Martinez knocked the murder victim's brother to the ground and kicked him in the head twice. The murder victim appeared and intervened, asked the defendants why they were "messing with [his] little brother" and tried to break up the fight. Alcaraz got out of his car and pointed a gun at the murder victim, the murder victim's brother, and the attempted murder victims. Lopez got out of the car and he and

[2] He was the victim of the aggravated assault.

one of the attempted murder victims traded hand gestures. The three defendants got back into Alcaraz's car and the latter laughed and drove it a short distance before driving back to a spot near where the victims were standing, almost running over one of the attempted murder victims. Alcaraz got out, pointed his gun at the men and started shooting, fatally wounding the murder victim and hitting an attempted murder victim in the wrist.

The parties stipulated that La Raza Controla is a criminal street gang. The prosecution's gang expert testified that it was a territorial gang, dominating certain areas within and slightly without the city limits of Hemet. The victims were from San Jacinto. Alcaraz stipulated that members of the gang have engaged in a pattern of criminal activity and on the day of the crimes, he was aware of that. Other evidence showed he was an active member, as did the opinion of the prosecution's gang expert, who testified that he was one of its original members.[3] On April 30, 2001, Alcaraz had admitted to the case agent that he was a member of the gang. Photographs of the three defendants in each other's company flashing what could be interpreted as gang signs were found in a room Alcaraz had occupied at his girlfriend's mother's house after the crimes. In a videotaped interrogation played for the jury, Lopez admitted that he was "Scrappy" from the La Raza gang. There was other evidence that he and Martinez were both members and the prosecution's gang expert testified that the two had participated in a gang fight, along with other La Raza members, the March before the crimes. A partygoer testified

[3] In light of these references to the record, along with those related to Lopez's and Martinez's membership in the gang, Alcaraz's assertion that "[t]he only evidence presented was that the defendants may have been gang member[s]" is almost comical.

that Lopez and Martinez were dressed like gangsters at the quinceanera. One of the attempted murder victims told police that Martinez had thrown hand signals while telling the murder victim's brother to watch his back during the argument inside the party.[4] He and two other attempted murder victims and the murder victim's brother testified that when Alcaraz initially pointed his gun at the murder victim and his companions, the former challenged Alcaraz to shoot him. The prosecution's gang expert opined that Alcaraz, as a gang member, had to respond to this challenge or he would be viewed as weak and not "down for [his] gang," especially since it occurred in the presence of younger gang members, Lopez and Martinez.

The prosecution's gang expert testified that respect means everything in the gang culture, and it is the result of fear and intimidation which is produced by violence and the threat of violence. He said gang members are required to commit crimes and back up other members of the gang in any confrontation the latter might have or they would be ostracized or physically harmed, as the gang would appear weak by the community. According to him, members cannot tolerate being disrespected by members of the community.[5] If a member is challenged to do something or to fight and does not respond, he would appear to be weak. Members must win any confrontation with anyone else, even if they have to resort to the use of deadly force to do so. He said it was common for violence, including shootings, to occur in trivial situations, including when members are

---

[4] Thus, Alcaraz's assertion that "[t]here was no evidence presented that any gang names or signs were exposed during the [initial] . . . confrontation" "or [the shooting]" is incorrect.

"mad-dogged," or are in verbal confrontations or fistfights with others. He testified that carrying a gun was a sign of status in the gang, which the carrier would not try to keep from his fellow members. He opined that Lopez and Martinez's recruiting Alcaraz to help them avenge the insult of being kicked out of the party was consistent with gang behavior. He also opined that the shootings were for the benefit of the gang, were done in association with the gang, and were motivated by the defendants' membership in the gang.

## ISSUES AND DISCUSSION

1. *Lopez's and Martinez's Convictions for Murder, Mayhem and Attempted Murder*

a. *Martinez's Convictions for These Crimes Under the Natural and Probable Consequences Theory of Aider and Abettor Liability*

The prosecutor argued to the jury and the instructions provided that Martinez could be guilty of murder, mayhem, and the four attempted murders if they were natural and probable consequences of an aggravated[6] or simple assault on the murder victim's brother, which was either (1) an object/objective of a conspiracy in which Martinez was a member,[7] or (2) he aided and abetted. Martinez here claims that his convictions for these six crimes must be reversed because of the possibility that any juror relied on the latter theory of liability. He contends that because he was the actual perpetrator of an

---

*[footnote continued from previous page]*

[5] The gang expert opined that none of the victims were gang members.

[6] In this particular case, the aggravated nature of the assault was that it was by means of force likely to cause great bodily injury or death. Hereinafter, our references to aggravated assault mean an assault by means of force likely to produce great bodily injury, as distinguished from simple assault or armed assault.

aggravated or simple assault, he cannot also be its aider and abettor. We rejected an identical argument in *People v. Culuko* (2000) 78 Cal.App.4th 307, 329-330. Therein, we cited *People v. Olguin* (1994) 31 Cal.App.4th 1355, a case eerily similar to this on its facts. We quote from *Culuko* as to *Olguin*, ". . . Olguin, Mora, and Hilario, all members of the same gang, encountered several members of a rival gang, including victim Ramirez. [Citation.] After an initial verbal confrontation, Mora punched Ramirez in the face, knocking him down. Ramirez got up and started walking toward the defendants. Olguin then shot and killed Ramirez. [Citation.] Both Olguin and Mora were found guilty of second degree murder. [Citation.] [¶] On appeal, Mora argued the natural and probable consequences doctrine did not apply to him because he was the perpetrator of the target assault on Ramirez. [Citation.] The appellate court disagreed: 'The flaw in Mora's reasoning is that a perpetrator of an assault and an aider and abettor are *equally* liable for the natural and foreseeable consequences of their crime. Both the perpetrator and the aider and abettor are principals, and *all* principals are liable for the natural and reasonably foreseeable consequences of their crimes. . . .' [Citation.] 'In fact, this case aptly demonstrates the folly of Mora's position. If it were adopted, Hilario, who did nothing but stand by and watch, could be convicted of murder if the jury were convinced he was there to back up his homeboys and thereby encouraged Olguin and Mora in the assault on Ramirez. But Mora, who actually perpetrated the assault, would escape liability on the basis that he was the party who initiated the action. [¶] Fortunately, that

---

*[footnote continued from previous page]*

[7] But see second paragraph of footnote 10, *post*.

is not the law. Mora was a principal in the assault on Ramirez and therefore responsible for the natural and probable consequences of that assault.' [Citation.]" (*People v. Culuko*, *supra*, 78 Cal.App.4th at pp. 329-330; see also *People v. Fagalilo* (1981) 123 Cal.App.3d 524 [The defendant was a direct perpetrator of a robbery and was liable for assaults committed by his codefendant which were natural and probable consequences of the robbery.].)

*b. Simple or Aggravated Assault as Possible Target Offenses for Murder, Mayhem, and Attempted Murder*

Citing three cases, while implying that others not cited exist, Lopez and Martinez contend that neither simple nor aggravated assault can be a target offense under the natural and probable consequences approach to their liability for the murder, mayhem, and attempted murders.[8] The defendants misread these cases. In *People v. Prettyman* (1996) 14 Cal.4th 248, the female defendant encouraged the male defendant to commit the target offense, assaulting the victim with a steel pipe, which ended in the victim's death. In discussing whether the murder was a natural and probable result of the target offense(s), the court observed, "If . . . the jury had concluded that [the female defendant (hereinafter, the female)] had encouraged [the male defendant (hereinafter, the male)] to commit an assault on [the victim,] but . . . [the female] had no reason to believe that [the male] would use a deadly weapon[,] such as a steel pipe[,] to commit the assault, then the

[8] Ironically, a case Lopez and Martinez cite in the recasted version of their argument appearing in their reply brief (see fn. 10, *ante*), *People v. Montes* (1999) 74 Cal.App.4th 1050, 1054-1055, held that simple assault (or even breach of the peace) can be a target offense.

jury could not properly find that the murder . . . was a natural and probable consequence of the assault encouraged by [the female]. [Citation.] If, on the other hand, the jury had concluded that [the female] encouraged [the male] to assault [the victim] with the steel pipe, *or by means of force likely to produce great bodily injury*,[9] then it could appropriately find that [the] murder . . . was a natural and probable consequence of that assault." (*Id*. at p. 267, italics added.) Contrary to the defendants' assertion, the foregoing is not even a holding that simple assault may not be the target offense under the natural and probable consequences theory. The *Prettyman* court was merely observing that in the case before it, it would have been proper for the jury to have concluded that the murder was a natural and probable consequence of an aggravated or armed assault, but it would not have been proper for the jury to so conclude if the female had no reason to believe that the male would use a deadly weapon. In such a case, it would be unreasonable for the jury to conclude that the murder was a natural and probable consequence of the unarmed assault. Here, in contrast, the murderer was armed with a deadly weapon and the jury could reasonably conclude that the two other defendants were aware of this.[10]

---

[9] Thus, even the defendants' incorrect reading of *Prettyman* cannot support their argument that aggravated assault cannot serve as the target offense for murder, mayhem, and attempted murder under the natural and probable consequences doctrine.

[10] No doubt encouraged by the People's partially not-on-point response to this contention, the defendants recast this argument in Martinez's reply brief, and Lopez asserts it as such in his opening brief, as, essentially, an insufficiency of the evidence argument (although Martinez labels it a jury instruction error) premised on the contention that there was no proof that they were aware that Alcaraz was armed or that he would use a deadly weapon. However, one of the cases they cite in support of their position in

*[footnote continued on next page]*

Any doubt that the defendants are misconstruing *Prettyman* in this regard is dispelled by reference to other language in the opinion. In tracing the development of the natural and probable consequences doctrine, the court discussed the first case to apply it, *People v. Kauffman* (1907) 152 Cal. 331. (*People v. Prettyman*, *supra*, 14 Cal.4th at pp. 260-261.) Therein, the target offense was, according to *Prettyman*, "breaking into the safe at the cemetery." (*Id*. at p. 261.) In mentioning later cases utilizing the doctrine, the court included *People v. Montano*, *supra*, 96 Cal.App.3d 221, wherein the target offense was, in *Prettyman*'s words, "beat[ing] up rival gang members."[11] (*People v. Prettyman*,

---

*[footnote continued from previous page]*
Martinez's reply brief, *People v. Montes*, *supra*, 74 Cal.App.4th 1050, defeats it. In *Montes*, Division Three of this court held, "To the extent [a more than 30-year-old decision] requires . . . [an] aid[er] and abett[or] to know of and encourage the [murderer's] intended use of a weapon, it is out of step with Supreme Court authority. [Citation.] 'The only requirement is that defendant share the intent to facilitate the *target* criminal act and that the crime committed be a foreseeable consequence of the target act. [Citation.]' [Citation.] [¶] . . . [The earlier decision] is . . . a remnant of a different social era, when street fighters commonly relied on fists alone to settle disputes. Unfortunately, as this case illustrates, the nature of modern gang warfare is quite different. When rival gangs clash today, verbal taunting can quickly give way to physical violence and gunfire. No one immersed in the gang culture is unaware of these realities, and we seen no reason the courts should turn a blind eye to them. Given the great potential for escalating violence during gang confrontations, it is immaterial whether [the aider and abettor] specifically knew [the murderer] had a gun. [Citation.]" (*Id.* at p. 1056; accord, *People v. Montano* (1979) 96 Cal.App.3d 221, 227.)

**11** In *Montano*, the Court of Appeal identified the target offense as battery. (*People v. Montano*, *supra*, 96 Cal.App.3d at p. 226.) *Montano* also cited *People v. Butts* (1965) 236 Cal.App.2d 817, 836, for the proposition that, under the natural and probable consequences doctrine, "an aider and abettor to *an assault* may be guilty of murder"; *People v. Perkins* (1951) 37 Cal.2d 62, 64, for the notion that "[a]n *unarmed* aider and abettor may be responsible in the same degree as the actual perpetrator; and *People v. Martinez* (1966) 239 Cal.App.2d 161, 178, in which the target offense of disturbing the peace was the objective of a conspiracy. (*People v. Montano*, *supra*, 86 Cal.App.3d at p. 227, italics added.)

*supra*, 14 Cal.4th at p. 262.) In still others cited by *Prettyman*, it was robbery, which, of course, can be accomplished without either the use of a weapon or by force likely to produce great bodily injury. In fact, in one of the cited cases, *People v. Fagalilo*, *supra*, 123 Cal.App.3d 524, neither was present.[12] Finally, the following language from *Prettyman* dispels any notion that a simple assault may not serve as a target offense, "[A]t trial[,] each juror must be convinced, beyond a reasonable doubt, that the defendant aided and abetted the commission of a *criminal act*, and that the offense actually committed was a natural and probable consequence of that act." (*People v. Prettyman*, *supra*, 14 Cal.4th at p. 268, italics original.)

*People v. Hickles* (1997) 56 Cal.App.4th 1183, another case Lopez and Martinez cite, like *Prettyman*, dealt with the failure of the trial court to identify and define for the jury the target offense(s). The *Hickles* court concluded that the failure required reversal of the defendant's conviction for murder because the jury could have concluded that the defendant aided and abetted an assault and battery "but had no knowledge [that the murderer] was armed and no intention to aid and abet an altercation involving force likely to produce great bodily injury . . . ." (*Id*. at p. 1197.) This holding tracks the language in *Prettyman* that we have already concluded has no application to the instant case.

Finally, *People v. Butts*, *supra*, 236 Cal.App.2d 817, upon which Lopez and Martinez also rely, dealt with the same scenario discussed in *Prettyman* and *Hickles*,

---

[12] The victim was merely shoved to the floor.

which we have concluded is not relevant here, i.e., a defendant who is unaware that the murderer intended to use a deadly weapon.

*c. Aggravated or Simple Assault as Target Offenses for Murder Under the Natural and Probable Consequences Doctrine*

Lopez and Martinez contend that using simple or aggravated assault as the target offense for murder violates "the spirit" of *People v. Ireland* (1969) 70 Cal.2d 522, 539. *Ireland* condemned using assault as the underlying offense for felony murder when the assault results in death. Lopez and Martinez attempt to use their faulty premise, rejected herein, that murder is not a natural and probable consequence of either simple or aggravated assault, to distinguish this case from the holding in *People v. Francisco* (1994) 22 Cal.App.4th 1180, which approved the use of assault with a firearm as a target offense for murder under the natural and probable consequences doctrine. In *Francisco*, the Court of Appeal rejected the defendant's contention that using assault with a firearm as a target offense violated *Ireland,* thusly, "[A]iding and abetting is one means under which derivative liability for the commission of a criminal offense is imposed. It is not a separate criminal offense. [Citation.] As an aider and abettor, it is the intention to further the acts of another which creates criminal liability. The '"natural and probable consequences"' [doctrine] . . . presents an 'all-encompasing standard for proper lay application of law to relevant evidence on the issue of legal causation of a criminal act.' [Citation.] If the principal's criminal act which is charged to the aider and abettor is a reasonably foreseeable consequence to any criminal act of that principal, and is knowingly aided and abetted, then the aider and abettor of such criminal act is

derivatively liable for the act charged. [Citation.] *For this reason*, the logical and legal impediments to criminal liability found in *Ireland* are not applicable and do not have persuasive value with respect to limiting an aider and abettor's liability. [Citation.]" (*Francisco*, *supra*, at p. 1190, italics added.) Therefore, contrary to the defendants' contention, the holding in *Francisco* is not inapplicable to this case because the former involved an assault with a deadly weapon and the latter involved simple or aggravated assault.

In *People v. Luparello* (1986) 187 Cal.App.3d 410, Division One of this court rejected an argument that *Ireland* was violated by using an aggravated assault, which was the object of a conspiracy, as a target offense for murder under the natural and probable consequences doctrine, thusly, "The felony-murder rule's purpose is to deter felons from killing negligently or accidentally. [Citations.] Theoretically, this end is achieved by holding . . . felons strictly responsible for all killings they commit during the perpetration, or attempted perpetration, of any statutorily enumerated felony. [Citation.] While arguably accepting the rule's purpose, our courts have nevertheless consistently stated felony murder is a 'highly artificial concept' which 'deserves no extension beyond its required application.' [Citations.] . . . [W]here the underlying felonious conduct is not independent of an assault which results in death, that is, where it merges with the homicide, our courts have consistently ruled the killing was outside the felony-murder rule. [Citations.] . . . [¶] In contrast, the policy supporting conspiratorial liability receives neither the disfavor nor restriction which adhere to the felony-murder rule. That a conspirator is criminally liable for acts done in furtherance and as a reasonable

consequence of a conspiracy is so well settled and accepted in California jurisprudence, citation to that proposition is burdensome rather than illuminating. . . . The law . . . implicitly recognizes the greater threat of criminal agency and explicitly seeks to deter criminal combination by recognizing the act of one as the act of all. . . . [T]he bridge between punishment and moral culpability, so illusory or, upon scrutiny, evanescent under the felony-murder rule, stands here on much firmer ground. So, too, deterrence, while absent when the underlying felony merges under the felony-murder doctrine, is clearly present under the accepted theory of conspiratorial liability." (*Luparello*, *supra*, at pp. 436-438.) The conspiratorial route to liability for natural and probable consequences, being the "fraternal twin" of the aiding-and-abetting route to the same liability, the foregoing remarks apply with equal force to the latter.

*d. The Object/Objective of the Conspiracy as a Target Offense for Murder, Mayhem, and Attempted Murder under the Natural and Probable Consequences Doctrine*

As already stated, the instructions to the jury provided them the option of convicting Lopez and Martinez of murder, mayhem, and attempted murder on the theory that these crimes were the natural and probable consequences of simple or aggravated assault, which was the object/objective of the conspiracy of which they were members. Specifically, the relevant instructions to the jury stated, in pertinent part, "*You must determine* whether . . . Martinez and Lopez are guilty as a member of a *conspiracy to commit* . . . [¶] *the crime of assault by means of force likely to cause great bodily injury or assault* . . . , [¶] and, if so, *whether [the murder, mayhem, and attempted murders* were] perpetrated by a co-conspirator in furtherance of that conspiracy and *w[ere] a*

*natural and probable consequence of the agreed upon criminal objective of that conspiracy*." (Italics added.)[13] Lopez and Martinez's contention that the instructions

---

[13] Although we have combined the two relevant instructions for the sake of simplicity, in the interests of thoroughness, we reproduce below the entirety of both instructions:

"A conspiracy is an agreement between two or more persons with the specific intent to agree to commit the crime of assault by means of force likely to cause great bodily injury or assault, and with the further specific intent to commit that crime, followed by an overt act committed in this state by one or more of the parties for the purpose of accomplishing the object of the agreement. Conspiracy is a crime, but is not charged as such in this case. [¶] In order to find a defendant to be a member of a conspiracy, in addition to proof of the unlawful agreement and specific intent, there must be proof of the commission of at least one overt act. It is not necessary to such a finding as to any particular defendant that defendant personally committed the overt act, if he was one of the conspirators when the alleged overt act was committed. [¶] The term 'overt act,' means any step taken or act committed by one or more of the conspirators which goes beyond mere planning or agreement to commit a crime and which step or act is done in furtherance of the accomplishment of the object of the conspiracy. [¶] To be an 'overt act,' the step taken or act committed need not, in and of itself, constitute the crime or even an attempt to commit the crime which is the ultimate object of the conspiracy. Nor is it required that the step or act, in and of itself, be a criminal or unlawful act."

"Each member of a criminal conspiracy is liable for each act and bound by each declaration of every other member of the conspiracy if that act or declaration is in furtherance of the object of the conspiracy. [¶] The act of one conspirator pursuant to or in furtherance of the common design of the conspiracy is the act of all conspirators. [¶] A member of a conspiracy is not only guilty of the particular crime that to his knowledge his confederates agreed to and did commit, but is also liable for the natural and probable consequences of any crime of a co-conspirator to further the object of the conspiracy, even though that crime was not intended as a part of the agreed upon objective and even though he was not present at the time of the commission of that crime. [¶] You must determine whether defendants Martinez and Lopez are guilty as a member of a conspiracy to commit the originally agreed upon crime or crimes, and, if so, whether the [murder, mayhem, and attempted murders were] perpetrated by a co-conspirator in furtherance of that conspiracy and [were] a natural and probable consequence of the agreed upon criminal objective of that conspiracy. [¶] Whether a consequence is 'natural and probable' is an objective test based not on what the defendant actually intended but on what a person of reasonable and ordinary prudence would have expected would be likely to occur. The issue is to be decided in light of all of the circumstances surrounding

*[footnote continued on next page]*

given did not require the jury "to find that the [murder, mayhem, and attempted murders were] natural and probable consequence[s] of the crime that is the target offense or the object of the conspiracy"[14] is simply incorrect.

*e. Insufficiency of the Evidence that Lopez and Martinez are Guilty of Murder, Mayhem, and Attempted Murder on the Theory that They Aided and Abetted Simple or Aggravated Assault*

Lopez and Martinez begin their attack on the sufficiency of the evidence to support their convictions for murder, mayhem, and attempted murder with another faulty premise, i.e., that the assault which they aided and abetted had to be committed by the

---

*[footnote continued from previous page]*
the incident. A 'natural and probable consequence' is one which is reasonably foreseeable."

**14** Lopez and Martinez otherwise stated this contention as follows: "[The instructions given] . . . expand[ed] aiding and abetting liability beyond crimes that are the natural and probable consequences of the target crime, and impos[ed] liability for crimes that are the natural and probable consequences of any crime committed by a co-conspirator in furtherance of the conspiracy," and the instructions "extend[ed] liability under the natural and probable consequences doctrine for a crime that is not a foreseeable consequence of the object of the conspiracy, but merely a foreseeable consequence of a different crime committed by a co-conspirator in furtherance of the conspiracy."

As Lopez and Martinez point out, the prosecutor argued to the jurors, that if they relied on the conspiracy route to liability for the crimes as natural and probable consequences, "you don't have to spend your time on whether or not a target offense was committed, whether or not they aided and [abetted] a felony assault or . . . a misdemeanor assault, it's did they agree to go back [to the parking lot] and fight? . . . [T]hey did an overt act. They went back to the parking lot. [¶] Then the question is is the murder a natural and probable consequence of the agreement to go back and fight?" Of course, this was a misstatement of the law as it was given to the jury. The instructions, as we have both summarized and reiterated them verbatim, provided that the murder, mayhem, and attempted murders had to be natural and probable consequences of the crime which was the target offense or object of the conspiracy, which was aggravated or simple assault. Lopez's and Martinez's trial attorneys should have objected to the prosecutor's argument as a misstatement of the law. Their failure to do so waives the matter. (*People v. Montiel* (1993) 5 Cal.4th 877, 912-913.)

same person who did the shooting. This is simply not the case. All that is required is that they aided and abetted a simple or aggravated assault, and the murder, mayhem, and attempted murders, *perpetrated by anyone*, were the natural and probable consequences of the simple or aggravated assault. (See, e.g., *People v. Culuko*, *supra*, 78 Cal.App.4th 307 [The perpetrator of the target crime did not have to be the same person as the perpetrator of the natural and probable consequences crime.]; *People v. Montes, supra*, (1999) 74 Cal.App.4th 1050 [opinion of Division Three of this court] [The target offenses were committed by someone other than the shooter.]; *People v. Olguin*, *supra*, 31 Cal.App.4th 1355 [The perpetrator of a battery is liable for his codefendant shooting the battery victim.]; *People v. Fagalilo*, *supra*, 123 Cal.App.3d at p. 532 [The perpetrator of a robbery is also liable for assaults committed by one of his codefendant's as the latter tried to avoid capture.].) An instruction given the jury so stated.[15]

Next, Lopez and Martinez contend the evidence was insufficient because there was no proof that they were aware of Alcaraz's intent to resort to the use of a gun. However, as we have already concluded, there was sufficient evidence to support such a conclusion. [16]

---

[15] This instruction required only that "a co-principal" in the crimes the defendant aided and abetted committed the murder, mayhem, and attempted murders.

[16] See also footnote 10, *ante*.

2. *The Defendants' Liability for the Enhancements*

a. *The Section 12022.53, Subdivisions (d) & (e)(1) Enhancements*

1. *Jury Instruction*

In connection with the murder, mayhem, and attempted murders, it was alleged, as to each of the three defendants, that he was a principal and a principal personally and intentionally discharged a firearm and proximately caused great bodily injury and death to a nonaccomplice, under section 12022.53, subdivisions (d) and (e)(1). Subdivision (d) provides for a 25-year-to-life enhancement for anyone who personally and intentionally discharges a firearm proximately causing great bodily injury or death to a nonaccomplice. At the time these crimes were committed, subdivision (e)(1) extended this provision to "any person charged as a principal in the commission of an offense that includes an allegation pursuant to this section when a violation of both this section and subdivision (b) of Section 186.22 are pled and proved."[17] Unfortunately, the jury was never given instructions on section 12022.53, subdivision (e)(1). They were, however, given an instruction, entitled in the printed instructions, "Defendant Armed in Commission of Crime," that it had been alleged, in connection with the murder, mayhem, and attempted murders, that a principal was armed with a semiautomatic handgun. This instruction was consistent in its definition of principals with another given, which defined them as ones "involved in . . . committing . . . a crime[,] . . . includ[ing] . . . [¶] . . . [t]hose who either

[17] Thus, the insistence by all three defendants that the gang benefit allegation had to be made "*in connection with th*[e section 12022.53, subdivisions (d) and (e)] *finding*" (original italics) is not supported by the provision.

directly and actively . . . commit . . . the act constituting the crime, or [¶] . . . [t]hose who aid and abet the . . . commission . . . of the crime." The only attorney to mention the section 12022.53, subdivisions (d) and (e)(1) allegation to the jury was the prosecutor, who made only one such reference, which was during his opening argument, as follows: "It's called the '*principal armed* finding,' . . . [which is] that the three participated in the crime and they were all principals. That means they either directly did the act or they aided and abetted. And during the commission of that act one of them *fired a gun and it caused great bodily injury or death*. [¶] So if you find the defendants guilty of murder[, mayhem, and the attempted murders], then this finding will . . . be a simple finding to make, that . . . th[ese crimes] *w[ere committed] by gun* and one of the three *had a gun*. So that's *principal armed*. You see that wording, don't be confused by that. It just means that one of the three *had a gun*." (Italics added.) As is evident from the foregoing, the prosecutor flip-flopped on whether the enhancement required the jury to find that a principal used the gun, resulting in great bodily injury or death, or that a principal was merely armed with a gun.

The defendants contend that this jury instruction error requires reversal of all the section 12022.53, subdivisions (d) and (e)(1) true findings. We disagree because the jury necessarily reached the conclusions required to support such findings under other instructions given. (See *People v. Earp* (1999) 20 Cal.4th 826, 886; *People v. Sedeno* (1974) 10 Cal.3d 703, 721, overruled on other grounds in *People v. Blakeley* (2000) 23 Cal.4th 82, 89, *People v. Breverman* (1998) 19 Cal.4th 142, 163, and *People v. Flannel*

(1979) 25 Cal.3d 668, 684.)[18] In connection with each offense for which it was alleged that a principal discharged a firearm proximately causing death or great bodily injury the jury made true findings as to the section 186.22, subdivision (b) allegations for all three defendants.[19] The jury found true allegations that Alcaraz personally and intentionally discharged a firearm proximately causing death or great bodily injury in connection with all six offenses. The jury necessarily found that Alcaraz was a principal in all six offenses. Lopez and Martinez were indisputably charged as principals in those offenses.[20] To whatever extent section 12022.53, subdivisions (d) and (e)(1) also required the jury *to find* that Lopez and Martinez were, in fact, principals, it did. Any jurors who convicted the two under the theory that they were aiders and abettors of a simple or aggravated assault, and the natural and probable consequences of that crime were the six offenses at issue, necessarily concluded that they were principals. Any jurors who convicted them under the theory that they conspired to commit simple or aggravated assault, and the natural and probable consequences of that conspiracy were

---

[18] In a letter brief submitted by Martinez's appellate counsel, she calls our attention to the recent decision of *Blakely v. Washington* (2004) 542 U.S. ____ [2004 D.A.R. 7581]. *Blakely* was based on the holding of *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348], that a defendant has a constitutional right to a jury trial of each element of an enhancement, other than an allegation that defendant has suffered a prior conviction, that increases punishment beyond the statutory maximum. Appellate Counsel cited *Apprendi* in her opening and reply briefs. *Blakely* adds nothing, beyond the views expressed in *Apprendi*, to the issue raised here. Our holding is not inconsistent with *Apprendi*.

[19] Thus, the defendants' concern that the jury was not given the definition of proximate cause is not well founded, as that concept was explained in connection with this allegation.

[20] The information recites that each was guilty of, committed, and was a principal

*[footnote continued on next page]*

the six offenses, necessarily came to the same conclusion under instructions given which provided, "A member of a conspiracy is not only guilty of the particular crime that to his knowledge his confederates agreed to and did commit, but is also liable for the natural and probable consequences of any crime of a co-conspirator to further the object of the conspiracy . . . ."

2. *Imposition of More Than One Section 12022.53, Subdivisions (d) and (e)(1) Enhancement*

As to Alcaraz, the trial court imposed 25-year-to-life terms for the section 12022.53, subdivision (d) enhancements in connection with the murder (count 1) and the attempted murders (counts 2, 4, 5 and 6). As to Lopez, the trial court imposed 25-year-to-life terms for the section 12022.53, subdivisions (d) and (e)(1) enhancements in connection with the attempted murders, all to run concurrently to the time imposed for the murder, which included a 25-year-to-life term for its section 12022.53, subdivisions (d) and (e)(1) enhancement. As to Martinez, the trial court imposed a 25-year-to-life term for the section 12022.53, subdivisions (d) and (e)(1) enhancement connected to one attempted murder (count 2), running consecutively to the time imposed for the murder, which included a 25-year-to-life term for the section 12022.53, subdivisions (d) and (e)(1) enhancement, and ran the time for that same enhancement connected to the other attempted murders (counts 4, 5 and 6) concurrently. All three defendants[21] here contend

---

*[footnote continued from previous page]*
in the commission of the offenses.

[21] Alcaraz also appears to complain that terms were imposed on him for both the section 12022.53, subdivision (d) and the section 12022.53, subdivisions (d) and (e)(1)
*[footnote continued on next page]*

that this was error, asserting that all the enhancements, except those attached to the murder and attempted murder of the only other victim to suffer great bodily injury (count 2), should have been stayed pursuant to section 654. Their position has been recently rejected in *People v. Oates* (2004) 32 Cal.4th 1048, 1055, in which the California Supreme Court held that section 12022.53 calls for the imposition of more than one enhancement under any of its subdivisions when injury is inflicted on only one of several victims and section 654 does not prohibit this.[22]

b. *The Gang Enhancements*

While admitting that there was sufficient evidence to show that they were active members of La Raza, nevertheless the defendants claim there was insufficient evidence that the crimes here were gang-related or motivated by the specific intent "to promote, further, or assist in any criminal conduct by gang members." However, the testimony of the gang expert, as recounted above, apart from his opinion that they were, constituted a sufficient basis upon which the jury could reach these conclusions.

---

*[footnote continued from previous page]*
enhancements as to the murder and attempted murders and this violates section 654. We say "appears" because this is what the title of Alcaraz's argument and certain portions of his argument imply. Alcaraz's assertion that the trial court imposed sentences for both the section 12022.53, subdivision (d) and section 12022.53, subdivisions (d) and (e)(1) enhancements is belied by the record, which shows that the trial court utilized only the former. Alcaraz's report of the sentence imposed in his statement of the case in his opening brief is riddled with errors and contains no citation to the record. However, even this erroneous reporting defeats his assertion. He states that the trial court stayed the sentences for the section 12022.53, subdivision (e)(1) true finding as to the murder and attempted murders (counts 1, 2, 4, 5 and 6).

[22] We appreciate the effort of appellate counsel for Martinez in bringing this case to our attention.

3. *Incompetency of Trial Counsel*

*a. Failure to Move to Bifurcate the Section 186.22, Subdivision (b) Gang Enhancements*

All three defendants contend that their trial attorneys were incompetent for failing to move to bifurcate trial of the section 186.22, subdivision (b) gang enhancements to prevent gang evidence from being introduced at trial. In support of their assertion that a trial court has authority to bifurcate such an enhancement, they cite *People v. Martin* (1994) 23 Cal.App.4th 76 and they analogize section 186.22, subdivision (b) enhancements to prior conviction enhancements, which the California Supreme Court has declared may, in appropriate cases, be tried separately. *Martin* refutes both of the defendants' assertions, thusly, "[The] authorization of bifurcation for the trial of enhancement allegations of prior convictions differs markedly from the [section 186.22, subdivision (b)] enhancement at issue here. The evidence of a prior conviction is separate and unrelated to the [currently charged] crime. Testimony is from different witnesses. Here, the same witnesses were testifying to events concerning the gang and the crime itself. [¶] The [People] point[] out that there is no basis in fact for bifurcation of th[e section 186.22, subdivision (b)] enhancement because it actually concerns the mental element present in the commission of the [charged] crime [(i.e., motive)] and thus is similar to enhancements [concerning acts of the defendant or principal that occur during the commission of a felony or the crime's consequences]. We agree. [¶] Here, the . . . same witnesses (gang members) and much of the same evidence used to prove the felony . . . were also relevant to establish the circumstances and intent of the killing. [¶]

[T]he motive . . . was relevant and important, both to the actual crime committed . . . and to the requisite intent for the enhancement. . . . There was no need for, and in fact, no reasonable way to bifurcate the enhancement allegation. [¶] [E]vidence of defendant's gang-related acts revealed circumstances of the homicide and were necessary to prove the enhancement; the evidence was not directed at his disposition to commit other crimes. [¶] The trial court . . . considered defendant's [motion to bifurcate], implicitly weighed the prejudice versus the probative value, and appropriately concluded the evidence was so inextricably intertwined as to mandate a single proceeding." (*People v. Martin*, *supra*, 23 Cal.App.4th at pp. 81-82, fns. omitted.) Absent from *Martin* was an additional fact here which the defendants do not even mention -- Alcaraz was charged with the special circumstance of intentionally killing the victim while being active in a gang. Thus, they do not even propose how this prosecutor could have possibly met his burden in regard to this special circumstance, while introducing no gang evidence during the guilt phase of this trial.[23] Specifically, the People were required to prove that Alcaraz was an active participant in a criminal street gang at the time of the murder and, more importantly, that the murder was carried out to further the activities of the gang.

b. *Failure to Request Pinpoint Instruction on Gang Membership*

All three defendants contend that their trial attorneys were incompetent for failing

---

[23] In his opening brief, Alcaraz makes only the following *possible* reference to the special circumstance allegation: "Defense counsels [*sic*] failure to request bifurcation of the gang enhancement allegations and *gang count* constituted a violation of Due Process as well as ineffective assistance of counsel." (Italics added.) If by "gang count" Alcaraz meant the special circumstance, he cites no authority for bifurcation of such an allegation

*[footnote continued on next page]*

to request a jury instruction that membership in a gang, alone, cannot substitute for proof beyond a reasonable doubt as to each element of the charged offenses. The jury was given many instructions on what type and quantum of evidence constituted the requisite proof . Such an instruction would have been needlessly repetitious of them and would likely have been rejected by the trial court, having no support in California decisional law. Therefore, their attorneys were not incompetent for failing to request it. Even if they had been incompetent in this regard, based on the strong evidence of guilt, we are persuaded that there is no reasonable probability that the giving of such an instruction would have resulted in outcomes more beneficial to any of the defendants. (See *Strickland v. Washington* (1984) 466 U.S. 668.)

c. *Failure of Lopez's Trial Attorney to Move to Suppress Lopez's Statements to Police*

In an interview of Lopez the day after the crimes, he was told, following advisal of his *Miranda*[24] rights, that the murder victim was dead and one of the attempted murder victims was then in surgery. He claimed he knew nothing about the crimes. He admitted that he was "Scrappy" from La Raza. He admitted being at the party and sitting in the front seat of the car. A videotape of this interview was played for the jury.

Lopez here contends that his trial attorney was incompetent for failing to move to have this videotape suppressed. Although Lopez was given his *Miranda* rights and stated that he understood them, when he was asked whether he was willing to talk to the officers

---

*[footnote continued from previous page]*
and he certainly provides no reasoned argument whatsoever for this.

about the crime, he responded, "What can I. I don't know. I don't know." One of the officers then said that they needed to know his side. Lopez responded that he knew that, but he did not know what happened. The rest of the very brief interview has been summarized above.

Lopez contends that the foregoing did not constitute an effective waiver of his *Miranda* rights and, on this basis, his attorney should have moved to have the videotape suppressed. However, if Lopez's trial counsel had successfully suppressed the tape, there is no reasonable probability the outcome of this trial would have been any different for Lopez. There was a plethora of other evidence that Lopez was "Scrappy" of the La Raza gang and that he was at the party and in the front seat of the car. Therefore, if error occurred, it does not require reversal. (See *Strickland v. Washington*, *supra*, 466 U.S. 668.)

## DISPOSITION

The trial court is directed to make the following changes as to Alcaraz: In his determinate abstract of judgment, references to the terms imposed for the firearm discharge findings under section 12022.53, subdivision (d) for counts 1, 2, 3, 4 and 5 shall be omitted, and, instead, placed on the indeterminate abstract of judgment, as those terms are 25 years to life, not 25 years, as the abstract currently provides. The references in the indeterminate abstract of judgment to terms imposed for the gang enhancements as to counts 7 and 8 shall be omitted and placed on the determinate abstract. The reference

---

*[footnote continued from previous page]*

**24** *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694].

in the indeterminate abstract to the term for the section 12022.53, subdivision (e) enhancement for count 6 being stayed or stricken shall be omitted, as this was not an order of the court. The indeterminate abstract shall reflect the fact that the jury made true findings on the gang allegations (section 186.22, subdivision (b)) as to counts 2, 4, 5 and 6 (the attempted murders) and the trial court used those findings as the basis for declaring that Alcaraz is ineligible for parole for 15 years as to each of those offenses. It shall also reflect the fact that the same finding was made in connection with the murder (count 1) and mayhem (count 2).

The trial court is directed to make the following changes as to Lopez: In his determinate abstract of judgment, references to the terms imposed for the firearm discharge findings under section 12022.53, subdivisions (d) and (e)(1) for counts 1, 2, 3, 4 and 5 shall be omitted, and, instead, placed on the indeterminate abstract of judgment, as those terms are 25 years to life, not 25 years, as the abstract currently provides. The indeterminate abstract shall be amended to (1) state that 25-year-to-life terms were imposed for the firearm discharge findings pursuant to section 12022.53, subdivisions (d) and (e)(1), for counts 1, 2, 3, 4, 5 and 6, noting that the term was stayed as to the enhancement alleged in connection with count 3, and those imposed in connection with counts 4, 5 and 6 were run concurrently, and (2) state that the concurrent terms imposed for counts 2, 4, 5 and 6 are life, not 25 years to life, as the abstract currently provides. Both abstracts shall reflect the fact that true findings were made as to the gang enhancements (§186.22, subd. (b)) for all offenses.

The trial court is directed to make the following changes as to Martinez: His first amended determinate abstract of judgment shall (1) reflect the fact that his conviction for mayhem (count 3) and assault by means of force likely to produce great bodily injury (count 7) was by jury, not by plea, as the abstract currently states, and (2) omit references to the terms imposed for the firearm discharge findings under section 12022.53, subdivisions (d) and (e)(1), for counts 1, 2, 3, 4 and 5, and, instead, placed them on the indeterminate abstract of judgment, as those terms are 25 years to life, not 25 years, as the determinate abstract currently states. The first amended indeterminate abstract of judgment shall be amended to (1) state that the consecutive term imposed for attempted murder (count 2) and the concurrent terms imposed for attempted murder (counts 4, 5 and 6) are life, not 25 years to life, as the abstract currently states; (2) state that 25-year-to-life terms were imposed for the firearm discharge findings under section 12022.53, subdivisions (d) and (e)(1), for counts 1, 2, 3, 4 and 5, noting that the term was stayed as to the enhancement alleged in connection with count 3, and those imposed in connection with counts 4 and 5 were run concurrently; (3) state that the term imposed concurrently for the firearm discharge enhancement on count 6 is 25 years to life, not 25 years, as the abstract currently provides; (4) state that the term imposed for attempted murder (count 2) was run consecutively to the term imposed for count 1, not concurrently, as the abstract currently provides; and (5) omit the sentence, "Def[endan]t is sent[enced] purs[uan]t to 667(E)(1) P[enal ]C[ode]." Both abstracts shall reflect the fact that true findings were made as to the gang enhancements (section 186.22, subd. (b)) for all offenses.

In all other respects, the judgments are affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

HOLLENHORST
J.

KING
J.